IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-554

FRANK S. BEAL, *et al.*,

Petitioners,

vs.

ANN DOE, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

AMICUS CURIAE BRIEF OF THE STATE OF NEW JERSEY

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Interest of the *Amicus*

The State of New Jersey is filing a separate *amicus curiae* brief in this matter because of its extreme importance to the State, in terms of the ability of its Legislature to fashion, within reasonable fiscal limits, such public

welfare assistance programs for medical services as it deems most responsive to the competing public needs. The decision of the United States Court of Appeals for the Third Circuit, as well as other similar decisions, which have interpreted Title XIX of the Social Security Act to impose upon the states the obligation to afford medical assistance for nonmedically necessary abortions are totally inapposite to the evident purpose and language of Title XIX and promise to affect the necessary flexibility a state must have to fashion public welfare assistance programs attuned to the immediate local climate.

The nature of the welfare assistance program in New Jersey in general and for medical services in particular, is extensive and varied. Because, however, the fiscal resources of the State are limited, it does not provide for every service which might be desired. Rather it reflects difficult choices made by the duly elected representatives of the people in terms of evaluating and balancing the complex and competing needs of the poor. The choices made by the State's Legislature concerning reimbursement for medical services are not only difficult because they must, of necessity, be selective, but they become even more difficult because of the delicate and controversial nature of the public welfare assistance program in general and the Medicaid program in particular. While the State must provide for the competing needs of its poor, it must do so with the confidence and acceptance of all of its people since the very well being of any democratic government depends totally upon the acceptance by and support of the people for whom it serves. This support and acceptance becomes particularly crucial when the State endeavors to provide for such controversial services as reimbursement for abortions. It is precisely this dilemma faced by any state's elected officials in attempting

to fashion responsive and remedial welfare assistance programs, that underlies the Congressional objective in Title XIX which grants to each participating state broad flexibility in fashioning medical assistance programs for the poor.

In an attempt to provide a sound and publicly accepted welfare assistance program of the State for medical services, the State of New Jersey, for the large part, has attempted to satisfy the most urgent and necessary needs of the poor. Thus, in terms of medical assistance, the State has, for the present, chosen to provide for those services which are medically necessary. In an attempt to extend such assistance for abortions, which so often has generated emotional reactions amongst the public, the State has followed this present policy and authorized, by Laws of 1975, Chapter 261 (N.J.S.A. 30:4D-6.1), assistance for the termination of a woman's pregnancy where "it is medically indicated to be necessary to preserve the woman's life." Even this limited approval of public assistance, however, has met substantial and widespread social and political resistance.

Indeed, a suit is presently pending in the Federal District Court for the District of New Jersey challenging the validity of the law on the same statutory and constitutional grounds raised below in this case. *Doe* v. *Klein,* Docket No. 76-74, United States District Court, District of New Jersey. As a result of the Court of Appeals' decision in this case, New Jersey's law has been preliminarily enjoined by the Federal District Court in *Doe* v. *Klein.* Any decision by the Court in the present case will substantially, if not conclusively, impact on the outcome of *Doe* v. *Klein* and the validity of Laws of 1975, Chapter 261.

Thus, an affirmance of the Court of Appeals' judgment would result in the imposition upon New Jersey of a highly controversial welfare assistance program for medical services which the State Legislature has determined, after considering the competing local concerns and needs, is not at the present time an appropriate allocation of available revenue resources. It is clear, therefore, that the State of New Jersey has a vital interest in preserving the authority and flexibility which has in the past been accorded its Legislature by the United States Congress to fashion provisions for controversial public welfare assistance which are consistent with its views of proper allocation of State resources amongst the competing interests of the poor.

ARGUMENT

The broad congressional Medicaid assistance program which permits participating states extensive flexibility in fashioning Medicaid programs responsive to the particular needs of each state does not mandate assistance for nonmedically necessary abortions.

The Medicaid Program established by Title XIX of the Social Security Act, 42 U.S.C. §1396 *et seq.*, provides a comprehensive scheme of federal financial assistance to enable states electing to participate to fashion appropriate programs for the furnishing of medical assistance to indigent families. The program is administered by the states and jointly funded by federal grants-in-aid and participating states. Annual appropriations by Congress are made to enable participating states "as far as practicable under the conditions in such states, to furnish . . . medical assistance" to qualified eligibles "whose income and resources are insufficient to meet the costs of necessary medical services." 42 U.S.C. §1396.

"Medical assistance" is defined in 42 U.S.C. §1396d(a) as payment for all or part of a broad range of types of medical care and services. A state, however, need not include in its Medicaid program all the categories of assistance described in that provision. In order to qualify for federal funding, a state medical assistance program is required to cover only those medical services enumerated in subsections (1) through (5): inpatient and outpatient hospital services, laboratory and X-ray series, skilled nursing facility servies, family planning services and physician services. 42 U.S.C. §1396a(13)(B); 42 U.S.C. §1396d(a)(1)-(5).

Nor must participating states include every kind of medical treatment encompassed within the five required enumerated types of services set forth in 42 U.S.C. §1396d (a)(1)-(5). The operative state plan requirement with respect to the adequacy of the amount, duration and scope of the state's program coverage is whether the state has "reasonable standards . . . for determining eligibility for the extent of medical assistance under the plan which . . . are consistent with the objectives of [Title XIX]. . . ." 42 U.S.C. §1396a(a)(17). Within the bounds of this statutory criterion of "reasonableness," the states have considerable discretion in fashioning the contents of their medical assistance programs to meet local competing needs and social policies.

Pursuant to this broad Congressional scheme, coverage under a state's Medicaid Program may properly be limited to the costs of "necessary medical services." Indeed such plan must provide for a method of "utilization review" for each item of care or services listed in 42 U.S.C. §1396d(a) so as "to safeguard against unnecessary utilization of such care and services. . . ." 42 U.S.C. §1396a (a)(30); 45 C.F.R. §250.20(a). Moreover the federal reg-

ulations specifically authorize "[a]ppropriate limits . . . placed on services based on such criteria as medical necessity or those contained in utilization or medical review procedures." 45 C.F.R. §249.10(a)(5)(i).

Thus, a state's Medicaid Program may be reasonably designed to provide only such medical assistance as is medically necessary. And it surely is not "unreasonable" or inconsistent with Congressional intent to exclude from Medicaid coverage unnecessary medical services, such as cosmetic surgery, which even many non-needy persons cannot afford or may be unwilling to pay for. Similarly, it would be reasonable and consistent with Congressional intent for a state to exclude coverage for the cost of medical services that exceed appropriate limitations established in the interest of fiscal control, such as limitations on the number of days of inpatient hospitalization or on the number and kinds of prescription drugs that will be compensable under Medicaid. Indeed, the federal regulations provide that appropriate limits placed on medical services based on medical necessity, utilization controls, or medical review procedures do not render the medical services insufficient in amount, duration and scope to reasonably achieve their purpose, and (with respect to required services) do not constitute an arbitrary denial or reduction in the amount, duration or scope of such services. 45 C.F.R. 249.10(a)(5)(i).

Within this broad scheme, it surely cannot be contended that Title XIX requires reimbursement for the costs of all medically feasible abortions. As previously discussed, a state need not provide financial assistance with respect to all medical services merely upon the patient's request; and, indeed, may limit its coverage to those services which are medically necessary. There is no apparent indication that Congress intended abortions to be treated differently.

While, as the Solicitor General has indicated, the practical and emotional consequences of a failure to perform an abortion may be profound, the same may be said, for instance, of a failure to perform medically feasible cosmetic surgery; yet surely it is not inconsistent with Title XIX for a state to determine not to reimburse for abortions unless they are medically necessary, such as where the woman's life is threatened. Indeed, the Solicitor General of the United States has expressed precisely this view of Title XIX.

This broad flexibility given to the states under Title XIX is reflective of a recognition that the fashioning of social welfare programs is fundamentally a matter of each state's democratic process. Because of the delicate and often controversial nature of welfare programs, which, of necessity, must entail difficult, both politically and socially, choices concerning where and to whom the available public resources will be allocated, each state's elective representatives must be able to fashion the particular program they deem most responsive to the competing needs of the poor. Thus, while it is not the function of courts to choose between competing claims for public revenues or conflicting social and political theories, analogously, Title XIX is clear example of Congressional awareness that determinations concerning allocation of public funds involving, as they must, areas of local controversy, are best entrusted to each state's elected body of representatives.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the application of the appropriate Congressional intent and purpose in enacting Title XIX clearly demonstrates that the decision below is erroneous and therefore should be reversed.

Respectfully submitted,

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